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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service.	)	Case No. 10-2586-EL-SSO

REPLY BRIEF

OF

DUKE ENERGY OHIO, INC.

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<u>TABLE OF CONTENTS</u>

PAGE

I. Introduction

In 2008, the legislature of the state of Ohio passed comprehensive legislation to continue the deregulation of the electric generation industry, under Amended Substitute Senate Bill No. 221 (SB 221). R.C. 4928.142, which was enacted as a part of SB 221, provides electric utilities with the option of having their standard service offers (SSOs) structured as market rate offers (MROs) or electric security plans (ESPs). The determination of whether to file an MRO or an ESP is left to the discretion of the utility, with the proviso that the Public Utilities Commission of Ohio (Commission) may not approve an ESP unless it finds that the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate than the expected results under an MRO.[1] On the other hand, the Commission is given no mandate, and indeed no authority, to compare a requested MRO against what it anticipates might be included in an application for an ESP. Rather, the Commission must allow the MRO if it finds that the statutory requirements have been met by the requesting utility.[2]

On November 15, 2010, Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) filed an application for approval of an MRO, to serve as its new SSO beginning January 1, 2012. Following the hearing on its application, Duke Energy Ohio filed its Merit Brief on January 27, 2011, as did several intervenors in the proceeding. This reply brief addresses issues raised in those intervenors' briefs.

In doing so, Duke Energy Ohio first makes two general observations. Many of the intervenors recommend revision – and even rejection – of Duke Energy Ohio's proposed MRO on the basis of speculation. Indeed, the Office of the Ohio Consumers' Counsel (OCC) offers

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[1] R.C. 4928.143(C)(1).

[2] R.C. 4928.142(B).

that revisions to the bidding schedule are necessary, yet cites to no evidence justifying such revision. Without reference to any evidence compelling such a result, the Greater Cincinnati Health Council (GCHC) suggests that the Company must prove that a truly competitive market exists in its service territory *before* the MRO is approved. And Industrial Energy Users-Ohio (IEU) bases many of its arguments on statements that cannot be reconciled with the complete evidentiary record. These arguments – rooted in speculation and conjecture – cannot properly be considered by the Commission here. Rather, as the Ohio Supreme Court has repeatedly found, a Commission determination must be supported by the record.[3]

Duke Energy Ohio's reference to the arguments of one intervenor on a specific topic or issue should not be construed as its agreement with the arguments of any other intervenor on the same topic or issue. Rather, where reference to the arguments of one party fairly summarizes the arguments of other parties, Duke Energy Ohio's intention is to rebut all such arguments. It is only for purposes of avoiding duplication that Duke Energy Ohio does not specifically recite each intervenor's argument on a specific issue.

II. Issues Raised Regarding Required Elements

The Ohio legislature, through its passage of SB 221, specifically enabled electric distribution utilities to structure their SSOs as either MROs or ESPs. The choice is left to the individual utility. The SSO model that appears to have been preferred is the MRO, as the legislature provided that the Commission may not authorize an ESP unless that ESP is more advantageous for customers than an MRO would be. No such requirement exists with regard to approval of an MRO. Preference for an MRO is further evident from the fact that, if a proposed

[3] *Industrial Energy Consumers of Ohio Power Company v. Public Utilities Commission of Ohio*, (1994), 68 Ohio St.3d 559, 563, 1994 Ohio 435, 629 N.E.2d 423 (reversible error occurs where a Commission determination is unsupported by the record).

MRO fails to comply with the applicable statutory and Commission rule filing requirements, the Commission cannot reject it. Rather, the Commission must inform the applicant utility how to correct the deficiencies so that the utility, if it accepts the corrections, may operate under an MRO. Conversely, if the Commission finds that an ESP does not meet the statutory requirements, it shall "disapprove the application."[4]

Nevertheless, to date, no utility operates under an MRO in Ohio. Duke Energy Ohio's application in this proceeding would change that and set a new standard for providing electricity in Ohio's competitive market.

Duke Energy Ohio's customers support the MRO construct. The OCC, representing residential ratepayers throughout Duke Energy Ohio's territory in this proceeding and throughout Ohio in other cases, is clearly in favor of MROs, as a general proposition. As the OCC states in its brief, "[t]he Commission should approve an MRO...because it will likely provide lower prices to customers than an ESP, which the Company currently uses to price its generation."[5] The OCC correctly points out that an MRO is "*more consistent* with many of the state policies under R.C. 4928.02 and the MRO plan *better advances* many of the state policies than an ESP construct could."[6] Specifically, the OCC explains that the MRO, as compared to an ESP, will more likely ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service, as well as the availability of unbundled and comparable retail electric service.[7] Similarly, the OCC opines that an MRO will better recognize the emergence of competitive markets for electricity, ensure effective competition by avoiding

[4] R.C. 4928.143(C)(1).

[5] OCC Initial Brief at 6-7.

[6] *Id*, at 8 (emphasis in original).

[7] *Id*, at 9-11.

anticompetitive subsidies, and ensure consumers protection against unreasonable sales practices, market deficiencies, and market power.[8]

An example of large commercial customers' view of MROs can be found in the initial brief of Wal-Mart Stores East, LP, and Sam's East, Inc., (collectively, Walmart). Walmart's initial brief begins with a strong statement of support for the use of an MRO as the Company's SSO.

> Walmart believes that SSO rates based on market prices will benefit SSO customers by providing more transparent generation rates and improved price signals. The increased transparency can drive more informed consumption management decisions by customers. This can benefit the individual customer and the utility system as a whole. Additionally, the proposed structure of the market-based SSO rates provides price transparency for customers when shopping for a generation service supplier.[9]

Wholesale suppliers and competitive retail electric service (CRES) providers support the MRO construct. Indeed, Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc. (collectively Constellation), FirstEnergy Solutions Corp. (FES), and the Retail Energy Supply Association (RESA) recommend that the Commission approve the Company's MRO, even if the Commission were to reject their proposed modifications to the MRO.[10] RESA specifically states that the proposed MRO "will greatly benefit customers" and that it is consistent with state policy. RESA also stresses that the MRO will result in increased

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[8] *Id.* at 11-14.

[9] Walmart Initial Brief at 2.

[10] Cross-examination of David Fein, Tr. V at 835; Cross-examination of Louis D'Alessandris, Tr. IV at 818; Cross-examination of Teresa Ringenbach, Tr. V at 993.

competition, a more customer-focused product, regulatory certainty, long-term investment, more electric supply options, a diverse group of suppliers, and better prices.[11]

The intervenors that oppose the MRO structure reference "state policy" as their justification for urging rejection of the Company's filing.[12] But, as discussed below and in Duke Energy Ohio's Initial Brief, the Company's proposed MRO furthers state policy, as described in R.C. 4928.02. Duke Energy Ohio has the statutory right to choose an MRO as its SSO. The Commission should approve the application of Duke Energy Ohio in this proceeding.

A. Competitive Bidding Process – R.C. 4928.142(A)(1)(a) through (e); O.A.C. 4901:1-35-03(B)(2)(d)

The law requires an MRO to be based on a competitive bidding process (CBP). It also requires (1) the CBP to be open, fair, and transparent; (2) the CBP to address a clearly defined product; (3) the CBP to include criteria for standardized evaluation of bids received; (4) oversight of the CBP by an independent third party that designed the solicitation, will administer the bidding, and will ensure that other criteria are met; and (5) evaluation of the bids before selection of the least-cost bid winner or winners.[13] Neither Commission Staff nor any intervenor specifically disputed, either in testimony or initial briefs, that the CBP proposed by Duke Energy Ohio would satisfy the third, fourth, or fifth requirements. It is thus undeniable that the proposed CBP includes standardized criteria for evaluating the bids, will be overseen by an independent third party that has been and will be appropriately engaged in the process, and will result in the

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[11] RESA Initial Brief at 1.

[12] *See, e.g.*, OEG Ex. 1, at 11-12, and Cross-examination of Stephen Baron, Tr. V at 955 (the MRO blending requirement is a consumer protection provision); Kroger Ex. 1, at 8 (blend is due to public policy of gradual transformation).

[13] R.C. 4928.142(A)(1).

bids being evaluated prior to selection of the least-cost bid winner or winners. These requirements have been met.

1. Open, Fair, and Transparent CBP.

In their initial briefs, some parties expressed concern that the CBP is not open, fair, and transparent. They base this concern, in part, on state policy requirements.

Commission Staff specifically argues that Duke Energy Ohio has not demonstrated that its CBP is open, fair, and transparent.[14] To support this conclusion, Staff relies on the Commission's opinion in the *first* application by the FirstEnergy electric distribution companies (FE) for approval of an MRO.[15] Staff's conclusion is flawed for several reasons and conspicuously contradicts its own recommendations in FE's subsequent MRO application.[16]

First, and most important, the presence of time-differentiated and dynamic retail pricing options has nothing to do with the openness of the CBP, the fairness of the CBP, or the transparency of the CBP. As the Commission correctly stated in the 2008 FE Opinion, such pricing options can make a company's costs "transparent to consumers" and can give "customers the information needed to control their electricity bills and make appropriate decisions regarding the purchase of power... ."[17] However, the requirement for openness, fairness, and transparency of the CBP relates to the process by which generation suppliers may bid for a tranche. That

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[14] Staff Initial Brief at 16-17.

[15] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO (Opinion and Order, November 25, 2008) (2008 FE Opinion).

[16] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 09-906-EL-SSO (Staff Comments, November 24, 2009).

[17] 2008 FE Opinion at 15.

requirement has nothing to do with consumers' purchasing decisions. Thus, the presence or absence of time-differentiated and dynamic retail pricing options for the Company's customers is not a basis upon which the Commission can conclude that the CBP is not open, fair, and transparent.

Second, Staff contends that the Commission should conclude that Duke Energy Ohio's time-differentiated and dynamic retail pricing options are non-existent, simply because few customers currently participate in the SmartGrid pilot program. As this Commission is well aware, Duke Energy Ohio is on the forefront of the efforts to deploy SmartGrid. Staff has participated in the Duke Energy Ohio Collaborative Working Group, which has, as a top priority, the establishment of time-differentiated pricing to take advantage of SmartGrid technology. In addition, as discussed by Duke Energy Ohio witness Jeffrey Bailey, other time-differentiated tariffs exist. Mr. Bailey explained that residential tariffs are differentiated based on winter and summer periods and that seasonal factors will be used to adjust the CBP component of the prices. Additionally, he testified, Duke Energy Ohio's residential Rate TD, Optional Time-of-Day Rate, will be adjusted for various time components. Residential pilot programs, like the one for SmartGrid, are also modified based on time components. Mr. Bailey further testified that commercial and industrial rates can be modified to a "quasi" time-of-use rate through Rider LM, which allows for modification of demand to be the greater of the on-peak demand or 50 percent of the off-peak demand, thereby allowing customers to shift load to off-peak periods and take advantage of lower billing demand and energy charges. With the addition of the CBP portion of the charge and its proportional increase over time, the CBP's seasonality will further transform nonresidential rates to be time-differentiated. Mr. Bailey also referenced the Company's real-time pricing rates, for nonresidential customers.[18] Also noteworthy in this regard is the approval, on January 27, 2011, of Duke Energy Ohio's tariffs for Rate TD-LITE, a new time-of-day rate that is a pilot program for advanced metering.[19] Staff, in its argument, not only ignores these additional elements of the Company's rates, but also leaps to the conclusion that low participation levels in one pilot program mandates a finding that the Company offers no time-differentiated or dynamic retail pricing options. Staff's argument that the CBP is not open, fair, and transparent due to low participation in the SmartGrid pilot program should be rejected.

Moreover, Staff apparently is confused with the reason for low customer participation in Duke Energy Ohio's SmartGrid pilot program. In addition to the fact that deployment is not yet compete, it must be recognized that participants in the program must be SSO customers of Duke Energy Ohio. Thus, while there is a discrepancy between the Company's SSO rates and market prices, customers would, in essence, have to pay to participate. Consequently, allowing Duke Energy Ohio's MRO, as proposed, would allow customers to more quickly realize market pricing and benefit from time-differentiated rates.

Further, Staff witness, Raymond Strom, admitted that he was not challenging the characterization of the Company's CBP as open, fair, and transparent.[20] Indeed, the *only* aspect of the MRO that he challenged as arguably non-compliant with the applicable statutory requirements was the proposed blending period.[21] Although this challenge is undermined by Mr.

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[18] Duke Energy Ohio Ex. 15, at 7-8.

[19] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Tariff for Rate TD-LITE*, Case No. 10-2429-EL-ATA (Finding and Order, January 27, 2011).

[20] Cross-examination of Raymond Strom, Tr. V at 1065.

[21] *Id*, at 1090, 1114.

Strom's own admission that the Commission can shorten the blending period to less than five years, it is indicative of a position from Staff that is not based upon the evidence.

Third, in its comments, Staff contends that the similarity between Duke Energy Ohio's proposed CBP and that approved for FE does not warrant a conclusion that the former is an open, fair, and transparent solicitation.[22] But this contention is illogical. It necessarily implies that FE's method of procuring generation supply under an ESP was *not* open, fair, or transparent. In other words, Staff's argument implies that customers under an ESP are not entitled to the same protection as customers under an MRO with respect to establishing generation rates. Certainly, the Commission would not have approved a CBP for use by FE if it had concluded that such a plan was unfair, improperly restricted bidder participation, and resulted in unclear pricing. Staff's arguments thus fail to demonstrate that the proposed CBP is not open, fair, and transparent.

Another argument relevant to the fairness of the proposed CBP is the OCC's suggestion that the independent auction manager should be ordered to report to the Commission any suspicion of bidding rule violations. The OCC is concerned that, without such a rule, Duke Energy Ohio would be able to provide a competitive advantage to itself or its affiliates.[23] But the OCC's argument ignores the existence of – and Duke Energy Ohio's adherence to – a corporate separation plan and administrative rules and, on this basis alone, it must be rejected.

Duke Energy Ohio, as an entity whose business is partially competitive and partially non-competitive, is required to operate pursuant to a corporate separation plan that prevents unfair

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[22] Staff Ex. 3 at 2.

[23] OCC Initial Brief at 19-21.

competitive advantage and the abuse of market power.[24] As so required, Duke Energy Ohio is currently operating under its Second Amended Corporate Separation Plan, which is currently under consideration by the Commission and has, in that proceeding, been audited by an independent auditor who reported positively on the plan.[25] Among the provisions of the Duke Energy Ohio corporate separation plan is a section that details how the distribution, transmission, and generation aspects of the Company will operate in conformity with the law. That section, Section XIV, describes the requirements in light of the then-current ESP, under which the Company was providing its SSO. As was stated in the application in the present case, the corporate separation plan will have to be amended to conform to the MRO that will be approved by the Commission. But the fact remains that Duke Energy Ohio is prohibited from operating without a corporate separation plan that prevents its regulated business from operating in such a way as to provide an advantage to its non-regulated business units or affiliates and it intends to comply fully with that law.

The OCC's speculation concerning future activity could be, quite appropriately, dealt with in the course of amendments to, and approval of, Duke Energy Ohio's corporate separation plan. But these premature concerns, which are unlikely to materialize given the Company's demonstrated compliance with its corporate separation plan, do not warrant revision of the Company's CBP.

The GCHC contends that the Commission should, prior to approving an MRO, require Duke Energy Ohio to show that the market in its territory is truly competitive, although the

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[24] R.C. 4928.17(A)(2).

[25] *See In the Matter of the Application of Duke Energy Ohio for Approval of the Second Amended Corporate Separation Plan Under Section 4928.17, Revised Code, and Chapter 4901:1-37, Ohio Administrative Code*, Case No. 09-495-EL-UNC (Auditors' Report, March 29, 1020).

GCHC fails to offer its own definition of such a market. The GCHC suggests, without support, that the auction result would not be a fair price, reflective of competition, if Duke Energy Ohio has market power and the ability to control pricing.[26] In this regard, it is noteworthy that no intervenor offered any evidence to suggest that Duke Energy is exhibiting market power in Duke Energy Ohio's service territory. Indeed, the only witnesses who testified on the issue admitted that they did not know the number of CRES providers serving retail load in Duke Energy Ohio's territory and did not undertake any analysis regarding market power.[27] There is no evidence on which the Commission can rely in questioning the existence of a truly competitive market in Duke Energy Ohio's service territory.

And the market in Duke Energy Ohio's service territory is undeniably competitive. Since 2009, the number of active CRES providers has doubled.[28] It is also notable that, since the filing of the application in this case, two additional CRES providers have been certified by the Commission to provide service in the Company's territory.[29] More than 60 percent of the Company's load is now being served by other suppliers. As a 20 percent switching rate was deemed representative of a competitive market under the market development plans of the past, it is clear that Duke Energy Ohio's market is competitive. And the truly competitive nature of this market will be perpetuated under the elements of the Company's proposed MRO and the CBP. Duke Energy Ohio has incorporated the option of a reservation price to prevent a large

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[26] GCHC Initial Brief at 23-26.

[27] Cross-examination of Kevin Higgins, Tr. V at 904-906; Cross-examination of Stephen Baron, Tr. V at 968.

[28] Duke Energy Ohio Ex. 2, at 7-8.

[29] In *the Matter of the Application of Border Energy Electric Services, Inc. for Certification*, Case No. 10-2939-EL-CRS (Certificate issued January 11, 2011); *In the Matter of the Application of Viridian Energy PA LLC for Certification as a Retail Generation Provider and Power Marketer in the State of* Ohio, Case No. 10-2909-EL-CRS (Certificate issued, amended to be in the name of Viridian Energy NJ LLC, January 7, 2011).

supplier from prematurely withdrawing from the auction, thereby unilaterally prompting the roll back feature of the auction design.[30] The Company has not incorporated a load cap so as to ensure that the least cost bidder emerges as the winning bidder. It is further noteworthy that competition in the FE territories continues to exist, after multiple auctions in which an affiliated company participated.[31]

Although these several reasons are sufficient to warrant rejection of the GCHC's contention, further support is found in the applicable filing requirements. There is no statute or Commission rule that requires true competition – in the form of 100 percent switching – before an MRO may be approved. Indeed, there is no requirement for a utility to demonstrate *any* degree of competition in its service territory as a precondition to an MRO. And, as the legislature provided for an MRO structure as early as January 1, 2009, at the expiration of rate stabilization plans, it is obvious that no such requirement could have been contemplated.

The final issue raised with regard to fairness is limited to the terms and conditions of the Master Standard Service Offer Supply Agreement (Master SSO Agreement). FES proposes three changes to the credit-related requirements of the Master SSO Agreement. FES asks that unsecured credit be granted to suppliers in one additional credit-rating range, that credit ratings published by Fitch be approved for use in assessing prospective suppliers' credit, and that first mortgage bonds be acceptable as collateral from suppliers.[32] As reflected in Duke Energy Ohio

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[30] Redirect examination of Robert Lee, Tr. I at 194-195.

[31] *See, e.g., In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 10-1284-EL-UNC; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO.

[32] FES Initial Brief at 17-19.

Exhibit 3, Attachment F-1, Duke Energy Ohio addressed two of FES's concerns such that further Commission review is not warranted. It did not, however, incorporate first mortgage bonds as an acceptable form of collateral.

With regard to first mortgage bonds, it is noteworthy that FES admitted that credit requirements differ from company to company and that it is reasonable for a utility to consider the potential impact to its customers of credit requirements. This is particularly important where, as here, the costs associated with supplier default that are not otherwise covered under the Master SSO Agreement are recovered from customers. FES's proposed revision, which differs from that used by its affiliated distribution companies, would expose Duke Energy Ohio, and consequently its customers, to additional costs should suppliers that provide first mortgage bonds as a first form of security default.[33] And such additional exposure does not appear warranted here.

To the extent FES's request to incorporate first mortgage bonds was prompted by the desire to have supplier requirements under the Duke Energy Ohio CBP align with those under the FE CBP with which FES is familiar and that this Commission has approved, it must be noted that first mortgage bonds are not an acceptable first form of collateral for FE. Rather, first mortgage bonds serve as a secondary form of collateral.[34] FES fails to explain why Duke Energy Ohio should assume greater risks than those assumed by other Ohio utilities and, absent such an explanation, this recommendation should not be considered. FES's recommendation is not a

[33] Cross-examination of Michael Swartz, Tr. IV at 802-803.

[34] *Id.* at 801-802.

basis for revising the proposed MRO as even FES would support approval of the Company's MRO, as modified by the revised Master SSO Agreement.[35]

Constellation submitted its own "wish list" of changes to the proposed CBP that it argues would enhance the bidding process. The list includes, *inter alia*, the provision of detailed information to bidders, both before and after the auction, the rejection of the use of a reserve price in the auction, and less restrictive credit terms for participating suppliers as defined in the Master SSO Agreement. However, Constellation witness David Fein admitted that he was not offering testimony with regard to the open, fair, and transparent aspects of the proposed CBP and that, even if the Commission rejected the proposed changes to the CBP that Constellation was recommending, it would still support Duke Energy Ohio's MRO.[36] Likewise, in discussing recommended changes to credit terms in the Master SSO Agreement, Mr. Fein admitted that the risk attendant to lowering credit requirements is one that ultimately falls upon Duke Energy Ohio's customers.

An important detail, overlooked by Constellation, is the benefit to all participants in the competitive process that results from consistency in the solicitation process. The revisions supported by Mr. Fein would extend and alter provisions that have already been approved by the Commission and found to be successful. In some instances, Mr. Fein recommends changes that have already been rejected by FE.[37] However, Mr. Fein admits that FE's auction resulted in

[35] *Id,* at 805.

[36] Cross Examination of David Fein, Tr. Vol. V, p.833, 835.

[37] *Id,* at 848.

robust and competitive prices for FE's customers and that he has no reason to believe that a similar auction would result in anything less for Duke Energy Ohio.[38]

Although Constellation and any other potential auction participant may want to tailor the proposed auction to their own needs, nothing offered by Constellation alters the fact that the CBP proposed by Duke Energy Ohio is open, fair, and transparent and likely to result in robust and competitive prices for Duke Energy Ohio's customers.

2. Clear Product Definition.

Only the GCHC disputes that the product in the CBP is clearly defined. The GCHC bases its concern on the allegation that "the Commission found [in the 2008 FE Opinion] that a slice-of-system approach did not provide the required clear product definition. The design proposed by Duke [Energy Ohio] is substantially similar."[39] The GCHC is wrong.

Although Duke Energy Ohio's proposed CBP is quite similar to the one proposed by FE, the Commission did not conclude that the product to be offered under FE's proposed auction was *un*clearly defined. Rather, the Commission concluded that FE had not demonstrated that the product was clearly defined. This may appear to be a minor distinction, but a close analysis will show the importance.

In the 2008 FE Opinion, the Commission reviewed the evidence presented in the case, including testimony revealing that the cost of wholesale generation in that situation might be significantly reduced through a process of obtaining blocks of wholesale power, rather than auctioning full requirements service. The Commission went on to say that FE had not demonstrated that its proposal was superior to making forward purchases of a clearly defined

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[38] *Id*, at 843.

[39] GCHC Initial Brief at 26.

quantity of power. Thus, the Commission concluded, FE had not demonstrated that its product was sufficiently clearly defined to advance the policy of ensuring reasonably priced retail electric service.[40] The Commission did not conclude in the 2008 FE Opinion that auctioning slices of the system was necessarily an unclear product; it simply concluded that FE had not met its burden of proof.

In contrast, there was no testimony elicited at the hearing in this proceeding that questions whether the cost of wholesale generation might be reduced through the purchase of blocks of wholesale power. It is also important to note that the Commission approved this same general structure in a case that followed the 2008 FE Opinion and that GCHC ignores. Because this subsequent case was a stipulated proceeding concerning an ESP, there was no discussion of the Commission's view of FE's CBP with regard to whether the slice-of-system approach allowed for a clear product definition. But it is inconceivable that the Commission would have approved an auction for a product that was *not* clearly defined. And it is again inconceivable that customers under an ESP would be afforded less protection than those under an MRO. Hence, any concern that the Commission may have had in 2008, as evidenced by the 2008 FE Order, appears to have been resolved.[41]

3. Additional Issues Related to CBP.

The OCC proposes that the Commission order Duke Energy Ohio to increase the number of auctions to be held each year to reduce further the customer risk and increase bidder participation. The OCC believes that Duke Energy Ohio's proposed auction schedule "exposes

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[40] 2008 FE Opinion at 16.

[41] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO (Opinion and Order, August 25, 2010) (2010 FE Order).

customers to significant price risk without any evidence in the record that such risk is warranted."[42] The OCC proposes holding at least two auctions per year when 30 percent or more of the load is to be auctioned and at least four auctions per year at the 50 percent of load level.[43]

What the OCC fails to do in this argument is cite to any testimony or other evidence in the record – or to file any testimony – to show that there is significant risk to customers under the schedule proposed by Duke Energy Ohio. The OCC also fails to cite to any evidence to support its own proposed auction schedule. Further, the OCC ignores the additional costs that admittedly would be incurred in conducting multiple auctions each year and offers no evidence to confirm that those costs would be offset by lower bid prices. Pursuant to R.C. 4928.142, these additional costs would be passed onto and recovered from customers. And absent any evidence on which the Commission can rely in imposing additional costs on customers, the OCC's argument must be rejected.

Similarly, the OCC asks that auctions not be held during peak months, but cites to no evidence to support its belief that such a schedule would reduce risk associated with the auction results.[44] This is pure speculation and does not warrant revision to the auction schedule.

Additionally, the OCC believes that customer risk would be mitigated by having Duke Energy Ohio bid for long-term contracts to provide a hedge against short-term volatility, which the OCC must assume results from contract terms not exceeding three years. It thus proposes that the Commission investigate the possibility of including a long-term product component in

[42] OCC Initial Brief at 14-15.

[43] *Id*, at 15.

[44] *Id*, at 16.

the auction.[45] But the OCC offers no evidence that suppliers under long-term contracts would not incorporate additional risk premiums to account for the uncertainty of, among other things, capacity prices that would be incorporated into contracts having a duration of longer than three years. Although Duke Energy Ohio has no objection to the Commission investigating this issue, it certainly should not be included in Duke Energy Ohio's MRO as a requirement, on the basis of mere conjecture.

The next issue concerning the auction relates to ongoing Commission oversight of the CBP. Commission Staff, in its brief, cites to R.C. 4928.142(C) and O.A.C. 4901:1035-11, the latter of which sets forth ongoing CBP review and reporting requirements.[46] Staff goes on to say that it has concerns about this issue, as it is unclear from the application whether Duke Energy Ohio intends to be subject to ongoing Commission review of the CBP. Specifically, Staff points out that the bidding rules, as proposed, would be subject to modification without Commission oversight. It concludes by suggesting that Duke Energy Ohio be specifically required to comply with Commission rules regarding ongoing oversight.[47]

The OCC and Ohio Partners for Affordable Energy (OPAE) also request that Duke Energy Ohio be required to seek Commission approval of any modifications of the CBP, including bidding rules, citing to O.A.C. 4901:1-35-11(D), which requires a discussion, in the annual filing, of proposed modifications to the CBP.[48] As explained by Duke Energy Ohio witness Robert J. Lee, the auction process will become cumbersome and protracted if each and every modification to the bidding documents requires formal Commission review and approval.

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[45] *Id.*

[46] Staff Initial Brief at 12-13.

[47] *Id*, at 14-15.

[48] OCC Initial Brief at 17-19; OPAE Initial Brief at 7-8.

Thus, an efficient process mandates some discretion on the part of the auction manager and the Company to revise the bidding documents. But Mr. Lee also acknowledged the Commission's oversight once the MRO is approved.[49]

The intervenors' arguments are immaterial to the only question before this Commission; namely, whether Duke Energy Ohio's MRO meets the *applicable* statutory and Commission rule filing requirements. In this regard, it is noteworthy that Commission Staff admitted that the requirements that pertain to an already approved MRO are not germane to the question of whether an MRO should be approved.[50] It is thus understandable why Duke Energy Ohio did not affirmatively address irrelevant Commission rules in its filing. But Duke Energy Ohio assures the Commission that it will follow those requirements applicable to an approved MRO, once its MRO is approved. Notwithstanding this assurance, Duke Energy Ohio would point out, though, with regard to the one example provided by Staff, that the Commission's rules do not specifically give it review authority over bidding rules.

Staff also indicates its concern that the proposed MRO does not include the option to change auction managers, leaving the initial auction manager in place in perpetuity.[51] Staff does not suggest a particular change to the MRO, but appears to use this concern as a rationale for urging an ESP over the MRO. The Company has not proposed an ESP; thus, this issue is irrelevant.

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[49] Cross-examination of Robert Lee, Tr. I at 189-191.

[50] Cross-examination of Raymond Strom, Tr. V at 1110-1111.

[51] Staff Initial Brief at 15-16.

B. Regional Transmission Organizations – R.C. 4928.142(B)(1) and (2); O.A.C. 4901:1-35-03(B)(1)(a) and (b)

The law governing approval of MROs includes only two requirements that are specific to regional transmission organizations (RTOs). The applicant for an MRO must show that it is a member of an RTO approved by the Federal Energy Regulatory Commission (FERC) and that such RTO has an independent market monitor with the ability to identify any potential for a market participant or the utility to exercise market power and the ability to effectively mitigate the conduct of market participants to prevent the exercise of such market power.[52]

Neither Staff nor any intervenor disputes that Duke Energy Ohio has satisfied its burden of proof with regard to these issues.

C. Published Information Source – R.C. 4928.142(B)(3); O.A.C. 4901:1-35-03(B)(1)(c)

SB 221 requires that an applicant show that there is adequate published information identifying pricing information for traded electricity.[53] Duke Energy Ohio addressed this requirement and neither Staff nor any intervening party has disputed this fact.

D. Blending Requirement and Ownership of Generation Facilities – R.C. 4928.142(D) and (E); O.A.C. 4901:1-35-03(B)(2)(j) and (k)

The blending requirement set forth in R.C. 4928.142(D) and (E) elicited substantial comment and dispute among the parties. Although Duke Energy Ohio is confident in its reading and interpretation of the law, it will attempt here to sort through the discussion by the intervenors.

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[52] R.C. 4928.142(B)(1) and (2).

[53] R.C. 4928.142(B)(3).

First, it should be noted that at least four parties support Duke Energy Ohio's statutory construction: Walmart, FES, Constellation, and RESA. Importantly, those parties, between them, represent customers and market participants. The remaining parties that discuss the Company's statutory construction are all clearly impacted by the blending proposal, yet they are not unified in their opposition.

Walmart, a major commercial customer, started its initial brief with the clear statement that it "does not oppose either the use of an MRO for the Company's SSO, or the Company's blending proposal."[54] Similarly, FES reads the statute to allow Commission modifications to the default, five-year blending period, notwithstanding any other requirements. FES goes even further than Duke Energy Ohio and supports a move to 100 percent CBP-based rates in year two of the MRO.[55]

Several other parties disagree. These parties, including Staff, can be roughly split into two camps. There are parties that believe that the default blending period is five years, with the Commission having the ability to shorten or lengthen that period, but not until the second year of the MRO. There are also parties that believe that, when the Commission acts in the second year or later, it can only lengthen the blending period. But both camps dispute any modification to the blending percentages based upon their interpretation of what justifies such modification. Thus, there are basically three issues: First, can the Commission alter the blending period before the second year? Second, can the Commission shorten the blending period, as well as lengthen it? Third, does the Commission have the ability to alter the blending period on the facts shown in this proceeding?

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[54] Walmart Initial Brief at 2.

[55] FES Initial Brief at 5-8.

1. Alteration before the Second Year?

Most parties seem to understand, if not agree, that Duke Energy Ohio's proposed blending period is based, not on just R.C. 4928.143(D) but on the interaction between that division and division (E) of that same section. The key language in the two divisions reads as follows:

> (D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five.
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> (E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually... .[56]

Basically, division (D) sets a default blending period and division (E) grants the Commission discretion to alter that default. Pursuant to standard rules of construction, the two divisions must be read and analyzed together.[57] Thus, for year one, division (D) mandates that the CBP percentage is 10, with no discretion allowed to the Commission. For year two, division (D) provides a default of not more than 20 percent based on the CBP.

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[56] R.C. 4928.142 (D) and (E).

[57] *United Telephone Co. v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129.

A small wrinkle appears in the analysis of years three, four, and five, as a few outlying parties contend that the words "not more than" must also apply to those subsequent periods. This is easily resolved on the basis of the precise words chosen by the legislature. Specifically, the non-existence of the word "and" provides the correct answer. The Kroger Co. (Kroger), in attempting to interpret the language in the statute, mistakenly suggests that "[i]n any reasonable understanding of the English language, the modifier "not more than" would apply to all items that follow it."[58] That, however, is not the case when the modifier is immediately preceded by another item on the list, as is the case here. In such a case, the modifier does not apply to all of the subsequent items, unless it is preceded by a word such as "and." Undoubtedly to support OEG's desired interpretation, its witness, Stephen Baron, interestingly, simply inserts the word "and" in what appears to be a direct quotation of the statute, without identifying it as an insertion.[59] But a simple example may help correct the faulty interpretation offered by intervenors such as Kroger and OEG. Consider the following three sentences:

(1) There go happy dogs, cats, monkeys, and zebras.

(2) There go dogs, happy cats, monkeys, and zebras.

(3) There go dogs and happy cats, monkeys, and zebras.

Sentence (1) reflects what Kroger describes; that is, a modifier appropriately applying to all nouns that follow it. Happy, coming first, applies to all of the animals. Sentence (2) is analogous to the actual language of the statute, where the modifier follows one of the items in the list and, therefore, does not modify the monkeys and the zebras. Only the cats are happy in that sentence. Sentence (3) shows how the legislature would have had to write the sentence if it had

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[58] Kroger Initial Brief at 7.

[59] OEG Ex. 1, at 6.

wanted the modifier not to modify the first item but to actually modify all of the following items in the list. Only in sentence (3) do we have unhappy dogs, with happy cats, happy monkeys, and happy zebras. The legislature most certainly did not include that extra "and" in R.C. 4928.142(D). "Not more than" does not apply to years three, four, and five.

Kroger also contends that its unusual reading is supported by the next sentence in division (D): "Consistent with those *percentages*, the commission shall determine the actual percentages for each year of years *one* through five."[60] Kroger suggests that the Commission must have some discretion in more than just year two, or the legislature would not have used the plural form of "percentage." What Kroger fails to state is that the directive, that the Commission shall determine actual percentages, manifestly applies to year one, a year in which even Kroger does not argue that there is any actual discretion. Thus, the requirement that the Commission determine more than one percentage does not mean that there is discretion within division (D) as to any year other than year two. The word "percentages" is plural in that sentence, not because the Commission is given discretion by division (D) as to more than just year two but, rather, because the Commission is directed to set the percentages for all five listed years regardless of its discretion.

It is indisputable that the blending percentage is preset by the statute at ten, for year one. It is also not subject to dispute that the Commission has discretion to determine the percentage in year two, up to 20 percent. With this understanding of the meaning of division (D), it is possible to add the parameters of division (E) to this base. Division (E) allows further discretion, in

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[60] R.C. 4928.142(D) (emphasis added).

subsequent years. As to what years does the Commission have this additional discretion, and when may it act?

The division's first words are "beginning in the second year... ." The legislature then said that the Commission could act only prospectively. The earliest year that could be prospective in the second year is the third year. So division (E) dovetails perfectly with division (D). Putting the two divisions together leads to the reasonable conclusion that year one is set at ten percent (no discretion from [D] and no ability to alter prospectively under [E]), year two has limited movement to no more than 20 percent (no more than 20 percent from [D] and no ability to alter prospectively under [E]), and the subsequent years with substantial discretion given to the Commission under division (E).

The final question raised by this discussion is whether division (E) imposes a limitation on when the Commission may act to alter the percentages in year three and beyond. As discussed in Duke Energy Ohio's Merit Brief, the Commission can act now, when approving the MRO, to alter those percentages. The statute unambiguously says that the Commission can alter the percentages beginning in the second year. The statute also says that the Commission *must* make alterations prospectively. But division (E) of R.C. 4928.142 does not plainly limit how long before the second year such alterations to the blending percentages may be made. Thus, the clear language of the statute allows the Commission to act now to alter the blending percentages that are applicable in year three and beyond.

It is well settled that a statutory provision must be read and followed where the language of that statute is clear and unambiguous. The statute cannot be interpreted in a manner that changes its clear meaning.[61] Only if the language is ambiguous may the Commission engage in an effort to discern the legislature's intent with reference to the criteria set forth in R.C. 1.49. Here, R.C. 4928.142(E) is not ambiguous and thus forced misinterpretations are not permitted under the guise of statutory construction. But assuming, *arguendo*, the Commission were to find ambiguity with regard to when it may alter the blending percentages, the factors enumerated in R.C. 1.49 support Duke Energy Ohio's contention that the Commission can act now. That is, the factors enumerated in R.C. 1.49 do not require the Commission to wait until the second year of the Company's approved MRO before it alters the blending percentages.

The object sought to be obtained.

The object of R.C. 4928.142 is a transition to full market prices for electric generation service in a manner that protects both customers and the utility company. This objective is evident from the fact that the General Assembly did not qualify the blending requirement as applying only when market prices were above the most recent SSO price. Here, in acting now to accelerate the transition to full market prices effective in year three, the Commission will achieve a significant result. It will either, consistent with the testimony of Judah Rose, enable the complete realization of the legislature's intent or allow all of Duke Energy Ohio's customers the opportunity to benefit from lower market prices.

The circumstances under which the statute was enacted.

As discussed above, SB 221 was enacted in 2008 to provide for the two formats under which an electric distribution utility may provide a SSO. Importantly, the MRO format was first introduced by the legislature in 2008 as a means of affording SSO supply to customers at

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[61] *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 78 N.E.2d 370, Syllabus of Court, Para. 5.

competitive, market rates. And given that the legislature made express provision for the MRO in 2008, it is undeniable that SB 221 was intended to bring about full competition in the supply of electric generation. Thus, the interpretation offered by Duke Energy Ohio would ensure realization of the legislature's intent.

The legislative history.

The legislative history is not instructive in discerning the intent of legislature in respect of division (E).

The common law or other statutory provisions.

There are no other statutory provisions concerning the MRO or a transition to full market pricing in a SSO supply. Similarly, the common law is of no assistance as the MRO is a creation of statute. Consequently, this factor is not instructive here.

The consequence of a particular construction.

Duke Energy Ohio's interpretation will result in a determination, now, that competitive market pricing in the supply of electric generation service will be perpetuated in Ohio. Importantly, its interpretation affords customers the certainty of access to lower market prices. The Company's interpretation gives it clarity in respect of long-term business decisions. And Duke Energy Ohio's interpretation confirms for wholesale suppliers and CRES providers the structure for a permanent competitive market. Conversely, the interpretation offered by several of the intervenors – that the Commission cannot act now – prevents the realization of a fully competitive market and removes the assurance to customers of access to lower market prices.

It is critical to recognize, in this regard, that the only evidence in the record is that market prices, over the proposed blending period, will be equal to or less than the legacy ESP price.[62] There is absolutely no testimony saying that prices in 2014, or at any other time, are anticipated to be higher than the legacy ESP price. Thus, locking in a full market price for year three at this juncture, which Duke Energy Ohio is agreeable to at this moment in time, is at worst neutral for customers and at best will provide lower prices. Confirming that blending schedule now gives customers the optimal chance for lower prices.

2. Can the Commission Shorten the Blending Period?

Some parties apparently read the word "alter" to mean *only* "to lengthen." OPAE, for example, flatly states that division (E) "provides the Commission to alter prospectively the proportions specified in R.C. §4928.142(D) and to extend the time of the blending period so that it can last as long as ten years."[63] Curiously, OPAE has no explanation for how and why it changed from "alter," in the first half of its sentence, to "extend," in the second half. Certainly the legislature would have used a word such as "extend" or "lengthen" if it had meant to do so. But as discussed in detail in Duke Energy Ohio's Initial Brief, the common or ordinary meaning of "alter" must be used in construing the statute and ascertaining the intent of the legislature. In this regard, Duke Energy Ohio remarks that those intervenors urging a definition of "alter" synonymous only with "lengthen" blatantly ignore the cardinal rules of statutory interpretation. That is, these intervenors are attempting to insert ambiguity into the statute where none exists so as to encourage an interpretation consistent with their own reading of the statute. But legislative intent is determined by the words used in the statute. And where those words, given their plain

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[62] *See* Duke Energy Ohio Ex. 3, *passim*.

[63] OPAE Initial Brief at 2.

and ordinary meaning, clearly reflect the intent of the legislature, the analysis is complete.[64] There is no resorting to external considerations, such as legislative history or the common law. And here, the word "alter" undeniably reflects the legislature's intent of vesting the Commission with discretion to either shorten or lengthen the default, five-year blending period. Efforts to seek a more liberal interpretation of division (E) fail as a matter of law.

3. Under What Circumstances Can the Commission Alter the Blend?

The statute allows the Commission to alter the blending percentages to mitigate abrupt or significant changes. In its Merit Brief, Duke Energy Ohio explained that the significant changes that it anticipates, based on the projections of Duke Energy Ohio witness Judah Rose, are either the convergence of market and ESP prices or, failing that, the fact that prices have not converged, as projected. Either would be significant.

The arguments by intervenors suggest that abrupt changes and significant changes may only be in terms of the actual prices. For example, Kroger talks about mitigation of price changes;[65] GCHC discusses an analysis of prices;[66] and Staff revises and adds to the language to refer to significant rate changes and suggests that the provision was intended to address price changes resulting from unforeseen economic circumstances.[67] However, these arguments have no basis in the language of the statute.

In contrast, FES clearly explains the bases on which the Commission's alteration of the blending percentages can be made. First, FES points out that prices in FE's territory are, based on auction, significantly lower than those under Duke Energy Ohio's current ESP. More than

[64] *State ex rel. Herman v. Klopfleisch*, (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995.

[65] *Kroger Initial Brief at 6.*

[66] GCHC Initial Brief at 11.

[67] Staff Initial Brief at 4.

one witness agreed that the FE auction results would be a "fair proxy" for the market price that Duke Energy Ohio might obtain through its CBP.[68] Thus, reaching market would be a positive change for customers. This significantly lower price should be accessible by customers, including those who do not choose to, or cannot, shop. Second, FES correctly points out that an accelerated blend mitigates volatility in prices. As a result, it logically follows that an accelerated blend also must mitigate any likelihood of an abrupt or significant change in the SSO price. The statute allows an alteration of the blend to mitigate an abrupt or significant change. The accelerated blending schedule that was proposed by Duke Energy Ohio mitigates volatility and, logically, abrupt or significant changes.[69]

The Commission is authorized, under these facts, to alter the blending percentages as proposed by Duke Energy Ohio. Consequently, Duke Energy Ohio encourages the Commission to approve its proposed blending schedule such that 10 percent of the generation supply is procured via auction for the first year of the Company's MRO (defined, without opposition, as seventeen months), 20 percent in the second year, and 100 percent in year three and every year thereafter.

With regard to the requirement concerning generation ownership, it is undisputed that Duke Energy Ohio owned generating facilities as of July 31, 2008. Although some intervenors, such as OEG, offer their preliminary opinions here,[70] Duke Energy Ohio is not seeking Commission approval to transfer its generating assets in this proceeding. Thus, any attempt by

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[68] Cross-examination of Kevin Higgins, Tr. V at 917-918; Cross examination of Raymond Strom, Tr. V at 1106.

[69] FES Initial Brief at 7-8.

[70] OEG Initial Brief at 8-9.

OEG to influence the Commission's future review of such an application, without the benefit of supporting evidence, must be disregarded.

E. Procurement Options – O.A.C. 4901:1-35-03(B)(2), (B)(2)(m)

The Commission's rules require Duke Energy Ohio to discuss and provide rationales for procurement options that it considered in developing the CBP, including portfolio approaches, staggered procurement, forward procurement, participation in day-ahead and/or real-time balancing markets, and spot market purchases and sales.[71]

The GCHC alone disputes whether Duke Energy Ohio has met this requirement. In doing so, it ignores the Company's discussion and rationale and, instead, suggests that the Company did not provide enough information to satisfy the GCHC's desires. Astonishingly, the GCHC suggests that Duke Energy Ohio did not even consider active portfolio management, despite the uncontroverted direct testimony of Company witnesses on this issue. Duke Energy Ohio's witnesses discussed portfolio optimization. consistent with the general requirement to address portfolio approaches. To the extent the GCHC found that discussion lacking, it could have questioned the Company's witnesses on their review. But it did not. Instead, despite the evidence of record, it now summarily argues that the various procurement options considered by the Company were not fully explained. The GCHC's argument fails to render the Company's MRO deficient. The GCHC also compares Duke Energy Ohio's proposal in this proceeding with an unidentified FE proposal in which, according to GCHC, FE failed to demonstrate the superiority of its plans over making forward purchases.

[71] O.A.C. 4901:1-35-03(B)(2)(m).

As Duke Energy Ohio explained in its Merit Brief, procurement options considered by the Company were discussed by two separate witnesses. Duke Energy Ohio witness James Northrup explained the rationale for various aspects of the CBP, as well as the consideration for management of its load obligations through requests for proposals and other portfolio optimization methods. Mr. Lee reviewed other alternatives, including a one-shot sealed-bid auction. With regard to the GCHC's mysterious reference to FE, it is likely that the GCHC intended to refer to the 2008 FE Opinion, as it referenced that opinion earlier in its brief. If that is the case, then the GCHC has again failed to take into account the Commission's later approval of the auction approach in a subsequent FE order.[72]

Duke Energy Ohio has discussed its rationale for selecting this procurement option appropriately. There is no requirement that an MRO applicant prove that the choice is optimal; only that it discuss the options consider and explain the rationale. Duke Energy Ohio has done this.

F. Retail Rate Design – O.A.C. 4901:1-35-03(B)(2)(a); 4901:1-35-03(B)(2)(i)

1. Demand Charge

The retail rate design proposed by Duke Energy Ohio in the application would establish the CBP component of the blended SSO price solely on cents per of kilowatt-hours, rather than the demand charges that exist under the current ESP. The OCC contends that demand charges send more appropriate price signals, taking into consideration the impact of large customers on the system at certain points in time.[73] The GCHC explains that the proposal would result in high

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[72] *See* 2010 FE Order.

[73] OCC Initial Brief at 35.

load-factor customers losing the relative price advantage that they currently have.[74] Kroger describes the change as giving a windfall benefit to lower load-factor customers.[75]

Duke Energy Ohio has justified its proposal to remove demand charges from the market-based portion of its SSO price. And, as the Company is migrating to full market pricing, in an environment in which competitive suppliers typically do not include express demand charges in their offers, it is appropriate to remove demand charges here. Thus, removing demand charges results in the SSO price being more comparable to offers made by CRES providers, further improving the transparency of the market. Duke Energy Ohio also notes that demand charges would continue to be included in the legacy ESP portion of the SSO price[76] during the blending period and in transmission and distribution rates unaffected by the MRO blending percentages.

2. Riders GEN and MRO

Several parties made suggestions, in their initial briefs, concerning Riders GEN and MRO. The first relates to how the initial rate for Rider GEN should be calculated as to the fuel and purchased power component. Rider GEN, as described by the Company,[77] includes the rate being charged under the current Rider PTC-FPP, as of December 31, 2011, as provided for in R.C. 4928.142(D), thereby including the current recovery of fuel and purchased power costs. FES notes that the Rider PTC-FPP rates are relatively volatile and, comprising a substantial portion of the price to compare, would have a large impact on the total rate under Rider GEN. FES notes that the timing is critical, with the rate that is in effect for Rider PTC-FPP at a

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[74] GCHC Initial Brief at 21.

[75] Kroger Initial Brief at 10.

[76] As used herein, the legacy ESP refers to the Company's most recent standard service offer price as contemplated under R.C. 4928.142(D).

[77] *See, e.g.,* Duke Energy Ohio Ex. 17, at 6.

particular date affecting the rate for Rider GEN for years to come. Thus, FES suggests that the Commission use an average rate for the Rider PTC-FPP portion of Rider GEN, looking at the rates over a recent, eight-quarter period.[78]

To the extent it is even relevant, FES's recommendation is incomplete. As FES admits, its recommendation would not be needed should Duke Energy Ohio pursue adjustments to its legacy ESP price during the blending period.[79] Conversely, if Duke Energy Ohio's proposal is accepted and it foregoes the opportunity to make adjustments to the legacy ESP price, FES does not identify which two years of the current three-year ESP should be used for purposes of calculating an average. Its proposal, therefore, can only be accomplished using some degree of speculation and guesswork, which would be avoided by simply using the Rider PTC-FPP rate as of December 2011. Use of the rate as of December 2011 also most clearly aligns with the expectation expressed in R.C. 4928.142(D). Thus, to the extent there will not be adjustments to the legacy ESP price, Duke Energy Ohio submits that its proposal to use the Rider PTC-FPP rate as of December 2011 is appropriate and prevents a circumstance in which arbitrary periods are used for purposes of rate calculation.

Similarly, the GCHC contends that the rate for both Rider PTC-FPP and Rider PTC-AAC at December 31, 2011, may not be representative of average costs over a longer term. It appears to be concerned that costs may go down and that the Commission would not then have the ability to make downward adjustments, if the rate is preset and Duke Energy Ohio has foregone

[78] FES Initial Brief at 15-16.

[79] Cross-examination of Louis D'Alessandris, Tr. IV at 811-812.

adjustments. GCHC asks that the Commission order Duke Energy Ohio to divulge information concerning future costs.[80]

The statute plainly states that the electric distribution utility is to start with the cost of fuel in its most recent standard service offer price, the recovery of which costs is under the Commission's review. Of course, Duke Energy Ohio has no more information about future costs than does the Commission or the GCHC. The Commission is fully aware of the history of rate changes in the existing riders. Duke Energy Ohio would note that Mr. Rose has predicted substantial increases in costs over the proposed blending period. Thus, it appears unlikely that downward adjustments of these cost components would be appropriate, even if the proposal were structured to allow such adjustments. Although the GCHC is concerned about this "gamble," the Commission should not be.

Staff and OPAE both propose that Staff have the opportunity to review the calculation of the rates for Rider GEN and MRO, prior to those rates going into effect.[81] The Commission, under the current ESP, reviews Duke Energy Ohio's rider adjustments. Duke Energy Ohio has no disagreement with allowing Staff the opportunity to review its calculations, prior to filing final tariffs when the rates would go into effect.

3. Rider SCR

Several parties comment on the bypassability of Rider SCR. IEU appears to be challenging the characterization of Rider SCR as conditionally non-bypassable on the principle of cost causation.[82] In this regard, IEU admittedly retreats from its prior agreement to a

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[80] GCHC Initial Brief at 16.

[81] Staff Initial Brief at 25-26; OPAE Initial Brief at 13.

[82] IEU Initial Brief at 16-17.

generation rider that, under certain, limited conditions, is temporarily non-bypassable.[83] Walmart also contends that Rider SCR should be entirely bypassable on cost-causation principles. In addition, Walmart claims that, if it is to be non-bypassable, Rider SCR should not recover the administrative costs of the CBP.[84] The OCC claims, similarly, that Rider SCR does not provide any benefit to shopping customers, also adding a suggestion that it is anticompetitive, since it would make shopping customers pay twice for the same generation costs.[85] OPAE and Staff also ask that Rider SCR be bypassable on the ground that the "circuit-breaker" concept would shift risk from the Company to customers.[86] Dominion Retail, Inc., (Dominion) also believes that Rider SCR should be fully bypassable on the ground that the costs being recovered are generation costs. Dominion suggests, with regard to Duke Energy Ohio's concern for the "last customer," that the problem could be addressed if it ever were to occur.[87]

But, as detailed by Duke Energy Ohio, the reason for allowing Rider SCR to be conditionally non-bypassable is to prevent a situation in which the Company's last few generation customers incur all of the costs of the rider. And Duke Energy Ohio submits that not unfairly burdening these last few generation customers with costs associated with securing the generation supply for other, former customers is undeniably compelling. It is further consistent with the regulatory principle of avoiding interclass subsidies. The intervenors' arguments fail to justify a revision of Rider SCR as proposed.

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[83] *See* FES Ex. 5.

[84] Walmart Initial Brief at 7-9.

[85] OCC Initial Brief at 43.

[86] Staff Initial Brief at 19; OPAE Initial Brief at 10.

[87] Dominion Initial Brief at 17-18.

Duke Energy Ohio also disagrees with Walmart's contention that Rider SCR should not, if non-bypassable, recover costs associated with conducting, administering, and implementing the CBP and costs for any independent auction consultant. It is indisputable that such costs relate to the holding of the auction that allows Duke Energy Ohio to provide an SSO to all consumers in its territory and, thereby, to provide an offer of last resort for their benefit. Inasmuch as customers who have switched to CRES providers benefit from the existence of the offer of last resort, it is appropriate that they should bear some of the cost. Thus, it is eminently reasonable to recover such costs through a conditionally non-bypassable rider.

Staff and OPAE also dispute the inclusion of "other costs" that are directly attributable to the auction or interaction with suppliers. Staff questions giving Duke Energy Ohio a "blank check" in this regard and proposes that Duke Energy Ohio consult with Staff regarding any such costs. Staff also would not allow carrying charges on what it anticipates would be small amounts. Staff is not asking for a prudence review but wants to be able to review the costs.[88]

Duke Energy Ohio vehemently disagrees that the proposed Rider SCR would be a blank check in its hands. Rather, the costs that can be recovered through Rider SCR are well described, limited, and squarely within the parameters of the MRO provisions under SB 221. Further, it is entirely unreasonable to base the granting of carrying charges on the amount being carried. Either carrying charges are appropriate on the ground that a company is paying costs, ahead of recovery, or they are not. Here, carrying charges are clearly warranted as the costs to be recovered from ratepayers will have been paid by the Company on behalf of the customers

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[88] Staff Initial Brief at 19-20. *See, also,* OPAE Initial Brief at 16-17.

who will benefit thereby. The Company does not disagree with Staff reviewing the quarterly adjustment of costs being recovered through Rider SCR.

4. Rider RECON

As previously described, Rider RECON is intended to true-up the costs and revenue of certain riders that are being eliminated through the proposed MRO. Specifically, it will aid in the elimination of Riders PTC-FPP and SRA-SRT. Several parties claim that Rider RECON should be bypassable. Some claim that both of those ESP-era riders are related to generation and that they have been either fully or conditionally bypassable.[89] FES also argues, based on current trends, that customer will end up paying for overcollections under Rider PTC-FPP. Staff and OPAE seek Commission review of amounts to be collected through Rider RECON.[90] Walmart proposes that Rider RECON could be made non-bypassable with regard to those shopping customers who were taking SSO service from Duke Energy Ohio immediately prior to the MRO or who did not qualify to bypass Rider SRA-SRT.[91]

As explained by Duke Energy Ohio, the riders eliminated by Rider RECON are not both bypassable. Rather, Rider SRA-SRT is conditionally bypassable for only certain customers that agree to stay off of the Company's SSO during the term of the current ESP or risk return at 115% of the generation rates. Rider SRA-SRT is a product of the Company's statutory obligation to provide default service. The Ohio Supreme Court has found that costs associated with fulfilling a provider of last resort obligation are noncompetitive;[92] consequently, such costs

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[89] Staff Initial Brief at 17-18, FES Initial Brief at 14-15; Dominion Initial Brief at 16-17.

[90] Staff Initial Brief at 18; OPAE Initial Brief at 9.

[91] Walmart Initial Brief at 5-7.

[92] *Industrial Energy Users-Ohio v. Public Utilities Commission of Ohio*, (2008), 117 Ohio St.3d 486, 492, 2008 Ohio 990, 885 N.E.2d 195.

can be recovered via a non-bypassable charge. Further, Walmart's suggested solution would cause Duke Energy Ohio to incur substantial costs for administration, beyond any possible benefits to be obtained. Consequently, Duke Energy Ohio renews its request that Rider RECON be non-bypassable for the limited time it will be used to reconcile two riders that will expire with the approval of the MRO.

With regard to Commission review of amounts to be collected, it is certainly true that the Commission will continue its annual audit of amounts currently being collected under these riders and, as such, is reviewing the amounts to be collected through Rider RECON.

5. Riders BTR and RTO

Rider RTO is proposed as an avoidable rider, designed to recover RTO costs that are billed to the Company for its share of SSO load. Rider BTR, on the other hand, is unavoidable and would recover Network Integrated Transmission Service (NITS) costs, as well as costs billed by an RTO under FERC-approved tariffs. The Company is proposing to recover its NITS costs directly from all customers, contrary to the current system in which each CRES provider assumes that responsibility and must incorporate a transmission cost into its generation rate.

The OCC is concerned that Riders BTR and RTO will result in the Commission's loss of authority to review and approve the recovered costs.[93] The OCC, together with other parties, also questions the appropriateness of allowing the recovery, through Rider RTO, of costs resulting from Duke Energy Ohio's expectation to withdraw from the Midwest Independent Transmission System Operator, Inc., (Midwest ISO) and align with PJM Interconnection, LLC (PJM). The OCC focuses on the ability of the Commission to review and conduct prudence

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[93] OCC Initial Brief at 23.

reviews of transmission-related cost recovery, pursuant to O.A.C. Chapter 4901:1-36. However, the OCC also argues that recoverability of these costs is not relevant to the Commission's review and approval of Duke Energy Ohio's proposed MRO. Rather, the OCC recommends review of the prudence of the RTO realignment costs in another proceeding.[94] OPAE agrees with the OCC that the costs to be recovered should be reviewed in a separate proceeding but would not even create Rider BTR at this juncture.[95] Staff does not dispute Rider BTR's non-bypassability to recover NITS costs, but would review and audit the charges annually. Staff also states that a decision as to the appropriateness of cost recovery would have to be the subject of a future proceeding, although it then proceeds to discuss the substance of such recovery. As to Rider RTO, Staff notes that recovery should be subject to audit.[96] The GCHC agrees with others that a review of the prudence of RTO realignment costs should not be part of this proceeding but, rather, should occur at a later point in time.[97] Eagle Energy, LLC, contends that recovery of RTO realignment costs should be bypassable, although it admits that such costs are currently unknown.[98]

Duke Energy Ohio absolutely agrees that setting the rates for Riders RTO and BTR is not part of the present proceeding. In this proceeding, the Commission is asked to approve tariffs that include provisions for riders, although the rates are not set. It is common practice before the Commission to determine a rider's terms but to start its rate at zero, subject to subsequent revision. Nothing in the Company's application would bar the appropriate exercise of the

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[94] *Id,* at 28.

[95] OPAE Initial Brief at 11-13.

[96] Staff Initial Brief at 22-25.

[97] GCHC Initial Brief at 19-21.

[98] Eagle Initial Brief at 3-4.

Commission's jurisdiction and authority, under statutory law, rules, and other orders or approved stipulations, to review rider rates. The dispute over the costs and benefits of RTO realignment in this proceeding is one that is entirely unnecessary and inappropriate.

Riders RTO and BTR should be approved as proposed.

6. Riders FPP and EIR

Duke Energy Ohio proposed placeholder tariffs, identified as Riders FPP and EIR, to adjust the ESP portion of the blended rate in the event the Commission alters the proposed blending schedule. The OCC does not dispute the riders other than to suggest that they be reviewed during the blending period for prudence of the charges.[99] On the other hand, Staff and OPAE, in addition to wanting an order addressing prudence reviews, believe that the riders should be rejected as they are "not effective until a future date."[100]

It appears that Staff and OPAE are confused by Duke Energy Ohio's application. If the Commission determines, in this proceeding, that the blending proposal by Duke Energy Ohio will not be authorized but the MRO is eventually approved in some form, then Duke Energy Ohio will, as is its statutory right, adjust its charges to account for changes in costs for fuel, purchased power, and environmental matters. Such adjustments would be made from January 1, 2012, onward. These are not riders that will only come into effect in 2014, as described by these parties. If the Commission determines, in this proceeding, that Duke Energy Ohio's blending proposal is to be approved and not subsequently modified, then Duke Energy Ohio has no objection with the deletion of Riders FPP and EIR, as they would then be unneeded.

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[99] OCC Initial Brief at 42.

[100] Staff Initial Brief at 21. *See, also*, OPAE Initial Brief at 10-11.

Seeking to create controversy where none exists, IEU suggests that Duke Energy Ohio's MRO is deficient because it "does not provide a process for identifying and including any benefits that may become available to [Duke Energy Ohio] in calculating" Rider FPP and Rider EIR.[101] But this statement blatantly ignores the Company's proposal, the limited evidence on the tax issue that was elicited from counsel for IEU during the hearing, and the relevant statutory and Commission filing requirements.

First and foremost, Duke Energy Ohio has offered to hold its legacy ESP price constant for the first twenty-nine months of its MRO. This offer, as explained by the Company, is conditioned on the Commission's approval of an accelerated, twenty-nine month transition to full market prices. As such, an adjustment to the legacy ESP price is not germane to this proceeding; the Company will not request any such adjustment under its proposal.

Second, to the extent Riders FPP and EIR are created for purposes of making adjustments to statutorily permitted costs, those adjustments would first be made *after* the MRO is approved. And in this regard, the rules applicable to approved MROs, such as O.A.C. 4901:1-35-11, detail the process for said adjustments. Only after the competitive bidding process has been approved by the Commission under R.C. 4928.142 is the utility directed to file its proposed adjustments.[102] These filings, through which adjustments are sought, must further identify any benefits that directly result from costs incurred for fuel, purchased power, environmental compliance, and compliance with Ohio's alternative energy requirements. It is undeniable that the process associated with adjustments is not a requirement for approval of an MRO but a requirement applicable to an approved MRO. There is no rule – and IEU cites to none – that imposes, as a

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[101] IEU Initial Brief at 6.

[102] O.A.C. 4901:1-35-11(B).

filing requirement for approval of an MRO, a detailed explanation as to how adjustments to the Company's legacy ESP price would be made subsequent to approval.

Further, it is indeed ironic that IEU maintains that the Company's application must be rejected because it failed to explain how incremental costs for fuel, purchased power, and environmental compliance would be offset by tax benefits. The irony lies in the fact that IEU did not elicit any meaningful evidence at the hearing of this matter from which the Commission can reasonably conclude that these undefined tax benefits would be directly related to those specific categories of cost for which adjustments can be made under R.C. 4928.142(D). Rather, IEU speculates that the tax benefits *may* include capital expenditures that *may* trigger eligibility for bonus deprecation. But IEU did not establish that those benefits would extend to any Duke Energy Ohio facilities. Thus, to find that some *possible, undefined* benefits from changes in the tax law justify revision of the Company's MRO would force this Commission to engage in impermissible speculation and conjecture and to rely upon an undeveloped record.[103]

7. Rider UE-GEN

Rider UE-GEN is proposed to recover certain uncollectible expenses related to its SSO service. As such, it is proposed to be bypassable. Staff contends that a generation uncollectible rider is not listed in R.C. 4928.142(D) and, therefore, it is not allowable under an MRO.[104] OPAE agrees, contending that this would pass generation costs through to customer in distribution rates.[105]

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[103] *Industrial Energy Consumers of Ohio Power Company, supra.*

[104] Staff Initial Brief at 18-19.

[105] OPAE Initial Brief at 9.

This proposed rider appears to be the main issue for Dominion, which believes that it should be expanded to cover uncollectibles generated by shopping customers and should be made non-bypassable. Dominion argues that Duke Energy Ohio's uncollectible expenses should be treated as they are for gas customers, with full collection through a non-bypassable rider.[106] Dominion specifically disagrees with Staff's position, describing it as a *Catch 22* if the Company would have to forfeit its right to recover bad debt by opting for an MRO. Dominion also notes Staff's error in viewing generation bad debt as a generation cost, rather than a "function of Duke [Energy Ohio]'s role as the entity that renders bills for service... ."

Duke Energy Ohio agrees with Dominion that it should not be placed in the untenable position of not being allowed to recover uncollectible expenses if it chooses the MRO as its SSO option. The legislature would not have placed such a penalty on the competitive choice. The conclusion that this Rider should be rejected simply because the SSO is an MRO is false.

Also related to Duke Energy Ohio's interaction with CRES providers is FES's proposal that the Company's existing waiver from the partial payment priority rules be rescinded. FES maintains that the waiver functions to complicate its efforts in the competitive arena. But FES admits that rescinding this waiver would necessarily force Duke Energy Ohio to incur substantial cost in modifying its current billing systems. FES does not dispute cost estimates of $5 million, in 2003 dollars.[107] Although there was no recommendation as to which party – customers or CRES providers – would pay for these system changes, FES agrees that there is a simple solution.

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[106] Dominion Initial Brief at 2-16.

[107] Cross-examination of Louis D'Alessandris, Tr. IV at 813-814.

Rider UE-GEN should be approved, consistent with the modifications described by Dominion and supported by FES. These modifications would result in a non-bypassable rider under which Duke Energy Ohio recovers bad debt expense associated with its SSO load, as well CRES providers' accounts receivable. The structure would be such that Duke Energy Ohio agrees to purchase the accounts receivable of CRES providers at no discount and renders payment to said providers on the 20th day following the month in which the billing occurs. This proposal is familiar to Dominion as it is how Duke Energy Ohio handles supplier accounts receivable in respect of natural gas supply. Furthermore, this proposal would avoid the expense, initially to Duke Energy Ohio and subsequently to others, of Duke Energy Ohio having to revise its current billing systems to account for application of two different payment priorities. And, importantly, this proposal of a non-bypassable generation rider, as explained herein, would support competition, as admitted by Commission Staff.[108]

8. Other Rider Issues

Rider AERR is proposed to recover the cost of complying with alternative energy requirements, specifically the cost of RECs associated with the SSO load. Rider AERR is an avoidable rider and is designed to be adjusted quarterly with true-up provisions.

Staff and OPAE suggest that Rider AERR should be subject to Commission review, in annual proceedings.[109] To the extent the rules contemplate Staff review, Duke Energy Ohio reiterates its intention to comply with those rules.

OPAE also raises issues concerning Rider SAW.[110] However, this rider is a distribution rider and clearly not a part of this proceeding. OPAE's comments should be ignored.

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[108] Cross-examination of Tamara Turkenton, Tr. V at 1018-1019.

[109] Staff Initial Brief at 22; OPAE Initial Brief at 11.

G. Financial and Rate Impact Projections – O.A.C. 4901:1-35-03(B)(2)(b) and (c)

Staff and the Ohio Manufacturer's Association (OMA) dispute whether Duke Energy Ohio satisfied the requirement to provide financial rate impact projects. Staff argues that Duke Energy Ohio was required to provide projections covering what it deems to be the minimum blend period to be allowed. Duke Energy Ohio provided projections covering the blending proposal that it made in the application. Thus, this argument actually follows and flows from the outcome of the blending discussion and need not be addressed separately.[111]

OMA, in an unusual reading of the rules, contends that these provisions require Duke Energy Ohio to provide an analysis of the impacts on transmission rates that might be caused by its realignment from the Midwest ISO to PJM.[112] OMA explains its position, saying that "the Commission is left in the difficult position of having to approve a CBP when the potentially significant upward push on rates (in particular transmission rates) remains a possibility."[113] OMA's error is that it has failed to account for the purpose of this proceeding. This proceeding is one in which Duke Energy Ohio is seeking the Commission's approval of its proposed MRO, *not* one in which it is seeking approval of its realignment. Neither approval nor implementation of the MRO is anticipated to have an "upward push" on transmission rates. OMA might argue that issue with regard to the realignment, but realignment is not before the Commission in this proceeding.

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[110] OPAE Initial Brief at 14-15.

[111] *Staff* Initial Brief at 7-12.

[112] OMA Initial Brief at 6-8.

[113] *Id*, at 6.

H. State Policy – R.C. 4928.02; O.A.C. 4901:1-35-03(B)(2)(d)

As noted at the outset of this Reply Brief, the OCC agrees with Duke Energy Ohio that an MRO is consistent with state policy. Walmart, too, argues that an MRO will provide transparency and improved price signals, benefitting customers and the system as a whole. Some parties, however, make contrary arguments concerning specific policies.

Through broad, unsubstantiated statements, IEU generally argues that Duke Energy Ohio's application must be dismissed because it does not demonstrate compliance with state policy.[114] IEU patently ignores the law and the evidence of record. As to the former, the Commission is to direct the utility on how to cure any deficiencies in its MRO filing. Thus, to the extent the Commission were to find that the Company's filing does not satisfy O.A.C. 4901:1-35-03(B)(2)(d), the Commission would then be required to inform Duke Energy Ohio as to the modifications needed to meet that requirement to the Commission's satisfaction. The Commission is statutorily barred from dismissing the application as non-compliant.

As to the latter, no party to this proceeding affirmatively presented any evidence suggesting that the Company's MRO was not consistent with or did not advance state policy. Thus, the direct testimony of each of Julia S. Janson, Kenneth J. Jennings, Richard G. Stevie, Andrew S. Ritch, and Daniel L. Jones is uncontroverted in this regard.

Attempting to advance its arguments now through testimony elicited on cross-examination of the Company's witnesses, IEU maintains that Duke Energy Ohio's application fails to comply with one state policy that concerns cross-subsidies. IEU further submits that the Commission cannot approve a rate plan that violates state policy.[115] But in examining the

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[114] IEU Initial Brief at 13.

[115] *Id.* at 13.

validity of this claim, it is important to restate IEU's contention. Specifically, IEU argues that "[t]he evidence [Duke Energy Ohio] offered in support of its Application does not show that the *relief requested* by [Duke Energy Ohio] is consistent with the requirements of Section 4928.02, Revised Code."[116] IEU then devotes most of its brief to discussing Duke Energy Ohio's realignment of RTOs. In doing so, IEU alleges that it is this realignment decision that renders the MRO deficient. To fairly describe IEU's claim, it would have the Commission believe that Duke Energy Ohio's MRO, or rate plan, conflicts with state policy because of an issue that is independent of the MRO filing requirements and, more importantly, outside the jurisdiction of this Commission. But using the authority on which IEU relies, the relevant question is simply whether the rate plan violates state policy. As discussed herein, there is no evidence in the record on which such a conclusion could be made and IEU's argument is thus without merit.

It is undeniable that the rate plan for which Duke Energy Ohio seeks approval (*i.e.,* the relief requested by Duke Energy Ohio) does not contemplate a Commission determination of whether the Company can withdraw from the Midwest ISO and realign with PJM. Moreover, such a determination cannot come before this Commission as RTO membership is wholly jurisdictional to the FERC.[117] Further, the conditions of RTO membership, including the terms of a withdrawal from or alignment with a particular RTO are FERC-jurisdictional. Duke Energy Ohio has received approval to realign its RTO membership from the FERC[118] and no party questioned this approval during the hearing of this matter.

[116] *Id.*(Emphasis added.)

[117] *See* Docket Nos. ER10-1562-000, ER10-2254-000 Order Addressing RTO Realignment Request, (October 21, 2010) at Paragraph 14.

[118] *Id.*

In approving the withdrawal, the FERC affirmed its three-part test for RTO withdrawal: (1) the withdrawal must satisfy the terms of the applicant's contractual obligations as they relate to RTO withdrawal; (2) the replacement arrangement must comply with FERC Orders No. 888 and 890 and the standard of review under those orders for proposed tariff provisions that differ from the pro forma open access transmission tariff (OATT); and, (3) the replacement arrangements must be just reasonable and not unduly discriminatory.[119] The FERC has upheld the proposition that membership in an RTO is voluntary, rejecting other parties' requests to adopt a more restrictive standard on a utility's RTO membership decisions.[120] Specifically, the FERC expressly rejected the notion that a withdrawing member must demonstrate that benefits of withdrawal outweigh the costs.[121] Therefore, subject to meeting its commitments at the FERC, Duke Energy Ohio has been authorized to realign its RTO membership.

Ohio law necessitates utility RTO membership.[122] The law does not require, however, that the utility be a member of a particular RTO. Nor does it prevent a utility from changing its RTO membership. Thus, contrary to the intimations of several parties to this MRO proceeding, Duke Energy Ohio's RTO realignment is not at issue here. As detailed in its application and supporting testimony, Duke Energy Ohio has met the only requirement under Ohio law vis-à-vis RTO membership, and that is the existence of the membership relationship. Significantly, no party to this proceeding – including IEU – challenges the result of Duke Energy Ohio's decision. That is, no party complains about Duke Energy Ohio's future status as a member in PJM. Rather,

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[119] *Id,* at paragraphs 48-49.

[120] *Id,* at paragraph 47.

[121] *See* Docket Nos. ER10-1562-000, ER10-2254-000 Order Addressing RTO Realignment Request, (October 21, 2010) at Paragraph 49.

[122] R.C. 4928.12 and 4928.142.

IEU challenges only the manner in which the decision was made. But the attempt by IEU to inject claims of state policy violation (and footnoted innuendo of corporate separation violations) is inconsistent with the authority upon which it relies and the filing requirements relevant to an MRO. Indeed, the activities on which IEU focuses in challenging approval of the MRO are irrelevant to approval of the MRO. And although Duke Energy Ohio would prefer, in the interest of efficient case handling, to focus on the issues integral to its application, it responds to IEU's baseless allegations here.

With a deliberately narrow view and intentionally misleading interpretation of the evidence, IEU seeks to portray Duke Energy Ohio as manipulative and anticompetitive in respect of its RTO realignment. IEU appears to be attempting to use this proceeding to make the argument that it raised in an entirely separate proceeding.[123] However, this is the wrong forum for these issues. IEU's manufactured claims blatantly ignore the evidence, which every other party to this proceeding, including Commission Staff, found inadequate for purposes of challenging the Company's adherence to state policy or applicable corporate separation rules.

As confirmed by the testimony in this proceeding, Duke Energy Ohio has demonstrated that its decision to withdraw from the Midwest ISO and to seek membership with PJM is expected to provide countless and measurable benefits. Duke Energy Ohio's witnesses explained how the realignment to PJM is beneficial to Ohio's competitive market, the Company's switched and unswitched customers, and the Company itself by way of operational efficiencies. There is no evidence in the record that disputes realignment to PJM was and is the right decision for Duke Energy Ohio. Rather, the evidence shows that the decision to realign was based on an analysis

[123] *In the Matter of the Complaint of Industrial Energy Users-Ohio v. The Midwest Independent Transmission System Operator, Inc., and Duke Energy Ohio, Inc.*, Case No. 10-1398-EL-CSS.

that concluded that remaining in Midwest ISO could provide a more costly alternative to retail customers.

IEU argues that the decision to realign to PJM was driven solely by the desire to [redacted]. But, in addition to being an issue for consideration by the FERC and not the Commission, such a statement intentionally disregards the evidence. As Duke Energy Ohio witness Janson discussed, the RTO realignment to PJM affords many benefits to the regulated utility. Specifically, Ms. Janson testified that, in her responsibility as President of Duke Energy Ohio, it was of utmost importance that customers would be at worst neutral and more likely benefitted by the expected move from the Midwest ISO to PJM.[125] Ms. Janson further explained that the realignment to PJM benefits Duke Energy Ohio's transmission system and its customers in terms of reduced congestion costs due to the "enhanced number of interconnections" with the American Electric Power Company (AEP) and Dayton Power & Light Company (DP&L) transmission systems already in PJM, versus the single connection to Midwest ISO.[126] Ms. Janson also stated that realigning Duke Energy Ohio with all other Ohio utilities in PJM would further competition and provide CRES providers greater transparency.[127] Although ignored by IEU, if Duke Energy Ohio were to remain a member of the Midwest ISO, its customers could be exposed to the significant risk of future Midwest transmission expansion planning (MTEP) costs.[128] Finally, Ms. Janson observed that PJM is a market with abundant demand response and energy efficiency opportunities and that

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[124] IEU Initial Brief at 10.

[125] Cross-examination of Julia Janson, Tr. I at 49-50.

[126] *Id. See also,* Cross-examination of Julia Janson, Tr. II at 336.

[127] Cross-examination of Julia Janson, Tr. II at 339.

[128] *Id.*

provides for a long-term view of generation and supply, thereby enabling the Company to make firm business decisions for its customers.[129]

Contrary to IEU's opinion, these same strategic benefits were considered by Duke Energy Corporation's executive management team as it reviewed Duke Energy Ohio's proposal to realign RTO membership and, based upon these benefits, ultimately recommended approval to Duke Energy Corporation's Chief Executive Officer.[130] The Company's presentation to executive management was a "joint presentation from the Transmission and Distribution function and from the Generation function" that included a "series of issues relating to different topics including benefits to customers, including design features of the markets," and provided the executive management with "a *potential scenario* in terms of financial impacts."[131] As evidenced by Duke Energy Ohio's internal documents offered into evidence, the Company thoroughly evaluated the realignment decision and its impacts on all aspects of the Company (generation, transmission, and distribution), as well as the impacts to customers and to the competitive market in Ohio. Contrary to the baseless and intentionally misleading description of the evidence as proposed by IEU, the Company's various documents presented to the Duke Energy Transaction Review Committee support the strategic benefits that were projected from the realignment to PJM:

- Customer switching – [Duke Energy Ohio] and other Ohio utilities now operate in a very competitive wholesale and retail environment and [Duke Energy Retail] is aggressively targeting those customers. With First Energy's (FE) commitment to leave MISO and join PJM, DEO will be the only remaining utility in MISO. Moving to PJM

[129] *Id.* at 339-340.

[130] Cross-examination of Julie Janson, Tr. I at 51-55; and Cross-examination of Julia Janson, Tr. II at 313.

[131] Cross-examination of Keith Trent, Tr. IV at 764 (emphasis added).

consolidates all Ohio utilities in a single RTO under a single set of wholesale and retail market rules for all Ohio suppliers.[132]

- PJM Market Attributes – PJM's market design better accommodates customer switching than MISO's design and MISO's market design is focused on vertically integrated utilities.[133]
- DEO's Joint-owned Units (JOU) – All of [Duke Energy Ohio's] legacy CGE generation would be physically located in a single market area with one price signal and fully deliverable to PJM. DEO's JOU's currently located in PJM, have limited MISO deliverability for capacity purposes. The joint-owners (AEP/ DPL) will benefit as well.[134]
- Duke Energy Ohio - Generation Assets – Moving to PJM combines nearly all [Duke Energy Ohio] owned generation capacity (legacy CGE and DENA) into a single RTO market area.[135]
- DEO's transmission system is highly integrated with PJM members AEP and DPL, not even considering the JOUs. [Duke Energy Ohio] has 12 interconnections with PJM versus 1 with MISO if it were to move.[136]
- Participating in PJM will align all JOUs in a single market where capital and O&M decisions are based upon single dispatch and market structure.[137]
- PJM's market structure is better suited for retail competition States.[138]
- Retail choice customers should have more options based upon PJM's market design, thereby reducing supplier risk premiums.[139]

The record shows that the benefits of Duke Energy Ohio's realignment to PJM are many and affect all aspects of the Company's operations. Moreover, the record confirms Duke Energy

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132 *See Confidential* IEU Exhibit 2a, May Whitepaper, page 1-2; and IEU Exhibit 1a, February White Paper, page 1.

133 *Id.*

134 *Id.*

135 *Id.*

136 IEU Exhibit 3a, page 4 of 7.

137 *Id.*

138 *Id.*

139 *Id.*

Ohio's customers are expected to benefit from the realignment to PJM. These customer-focused benefits include reduced congestion costs,[140] likely reduction in transmission costs,[141] greater opportunities for demand response and energy efficiency participation[142] and, as discussed below, avoidance of the risk of future MTEP costs.

Duke Energy Ohio witness Jennings, an expert in the PJM and Midwest ISO markets,[143] also identified the direct and tangible benefits resulting from Duke Energy Ohio's realignment to PJM.[144] With respect to the likely reduction in costs that customers may experience in PJM, Mr. Jennings explained that transmission system costs should be lower in PJM because of the lower load ratio share of costs allocated to Duke Energy Ohio once in PJM.[145] Currently Duke Energy Ohio and Duke Energy Kentucky make up 5.6% of the load ratio share of the Midwest ISO.[146] Since PJM is a much larger RTO than the Midwest ISO, Duke Energy Ohio and Duke Energy Kentucky will only make up 3.5% load ratio share of PJM.[147] This is important in that any charges that the ISO/RTO allocates based on a ratio share, when all things are equal, will be higher in the Midwest ISO. For example, if the cost of transmission expansion is $5 billion in the Midwest ISO's MTEP and also $5 billion in PJM's regional transmission expansion project (RTEP), then the allocation of capital in the Midwest ISO's MTEP will be $280 million versus $175 million in PJM's RTEP. That is more than $100 million in savings for customers when all

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[140] Cross-examination of Julie Janson, Tr. I at 50.

[141] Re-direct examination of Kenneth Jennings, Tr. III at 494.

[142] *Id,* at 498-501.

[143] *Id,* at 490-494.

[144] *Id,* at 490-504.

[145] *Id,* at 493-494.

[146] *Id,* at 493.

[147] *Id.*

things are equal; however, as was stated, it is not likely that all things will be equal, given the results of the Midwest ISO's Regional Generation Outlet Study (RGOS).

Also as Mr. Jennings pointed out, today transmission rates for customers in Ohio are based on a rate that is calculated by the average of the cost for all three companies that make up the Midwest Transmission System, Duke Energy Kentucky, Duke Energy Ohio, and Duke Energy Indiana. Once Duke Energy Kentucky and Duke Energy Ohio realign to PJM, the Midwest transmission system will be bifurcated. Essentially, Ohio and Kentucky will be separated from Indiana. Once the system is bifurcated, the exclusion of the Indiana costs from the Ohio/Kentucky transmission rates will actually reduce the average for Kentucky and Ohio. This reduction in the average will equate to a savings for customers of approximately $7 million.[148]

[redacted]

[redacted]

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[148] *Id.* at 494.

[149] Cross-examination of Kenneth Jennings, Conf. Tr. III at 535.

[150] *Id.*

Mr. Jennings provided further details regarding the differences between the Midwest ISO and PJM energy efficiency and demand response opportunities for retail customers. Mr. Jennings described the Midwest ISO as: (1) not incentivizing energy efficiency resources like PJM; (2) not as robust as PJM; and (3) lacking the level of penetration of PJM.[151] Mr. Jennings further stated that, in PJM's most recent Base Residual Auction, 12,500 megawatts of demand response and 700 megawatts of energy efficiency were offered directly by retail customers.[152] Mr. Jennings concluded that the PJM market provides more opportunities for Duke Energy Ohio's customers for energy efficiency and demand response.[153]

Finally, Mr. Jennings discussed the level of increased costs for likely future MTEP anticipated by the Midwest ISO. Duke Energy Ohio customers would be responsible for those costs if the Company elected to remain in the Midwest ISO. Mr. Jennings discusses the Midwest ISO's RGOS that shows anticipated MTEP in the Midwest ISO significantly exceeding those in PJM.[154] Specifically, Mr. Jennings described the RGOS as a study conducted by Midwest ISO, its members and staff, to examine the transmission requirements to make renewable generation developed in the western side of the RTO deliverable to the load pockets.[155] Mr. Jennings explained that the RGOS, dated November 19, 2010, shows three Midwest ISO solutions, all of which greatly exceed the likely and comparable expense in PJM.[156]

> Within the native voltage the expected transmission requirements in order to make the renewable deliverable is about $13.8 billion needed in MISO and just

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[151] Re-direct examination of Kenneth Jennings, Tr. III at 499-500.

[152] *Id,* at 499

[153] *Id,* at 501.

[154] *Id,* at 488.

[155] *Id,* at 487.

[156] *Id,* at 487-488.

> under $2 billion in PJM. The 765 kV solution is about $15 billion in needed upgrades in MISO and about $4 billion in needed upgrades in PJM. And under the DC circuit solution, it is about just under $13 billion in needed upgrades for the Midwest ISO and around $2 billion needed in PJM.[157]

The significance of that study is that it was authored by the Midwest ISO itself, and confirms what the Midwest ISO foresees as possible transmission expansion costs that will be allocated to its members in the future. Although Duke Energy Ohio may still be allocated some level of those costs simply due to the timing of the Company's RTO realignment, based on information available to date, Duke Energy Ohio believes that becoming a member of PJM will allow Duke Energy Ohio, and in turn, its customers, to avoid some level of those increased costs.

The benefits of RTO realignment articulated by Ms. Janson, and Messrs. Trent, Whitlock, and Jennings are undisputed. There is no evidence in the record to the contrary. The only evidence is that Duke Energy Ohio's realignment is expected to produce cost savings to customers, provide greater clarity for resource planning and joint operation of generating stations, provide greater transmission interconnectivity, further the competitive market, and provide customers with greater opportunities to participate in demand response and energy efficiency.

Duke Energy Ohio understandably conducted several cost/benefit analyses to determine whether the realignment would be economically supportable. These analyses involved various scenarios and inputs. However, despite the mischaracterizations of IEU, the manner in which these analyses were conducted is not evidence of a violation of state policy in the form of improper cross-subsidies or of corporate separation rules.

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[157] *Id.* at 488. Referring to Duke Energy Ohio Exhibit 13, page 12 of 148.

First, that no one directly under Ms. Janson's control conducted the analysis confirming these benefits does not render the benefits illusory or the analysis corrupt. As Ms. Janson explained, she does not have direct responsibility for transmission functions, as those are carried out by Power Delivery under the matrixed corporate structure in place at Duke Energy Corporation. Furthermore, and contrary to IEU's deliberately narrow view of the evidence, Duke Energy Ohio witness Jennings testified that Scott Henry conducted analyses relevant to the decision-making process.[158] Mr. Henry reported through the franchised electric and gas, or regulated, organization of Duke Energy Corporation that was overseen by James E. Turner.

Further, as explained by Messrs. Trent, Whitlock, and Jennings, the RTO realignment project was managed by a cross-functional team of individuals representing all aspects of the Duke Energy Ohio's business operations.[159] Duke Energy operates under a corporate separation plan, as evident by the structure in which the generation and transmission and distribution sides of the business are independently operated. Furthermore, individuals performing functions for the regulated distribution and transmission businesses report through a chain of command that is separate from that used by individuals performing functions on behalf of the non-regulated generation business.[160] Nonetheless, albeit functionally separate, the fact remains that, at present, Duke Energy Ohio, a single legal entity, still owns the generation, transmission, and distribution assets. Consequently, when a decision such as RTO membership has broad reaching implications on all areas of the business, it is not uncommon for such a cross-functional team of

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158 Redirect examination of Kenneth Jennings, Tr. III at 502.

159 Cross-examination of Keith Trent, Tr. IV at 764; Cross-examination of Charles Whitlock, Tr. II at 369-370; Redirect examination of Kenneth Jennings, Tr. III at 502.

160 Cross-examination of Julia Janson, Tr. I at 42-45.

individuals to perform a comprehensive analysis for the Duke Energy Corporate executive management.[161] Such was the case here.

The documents presented to the TRC included the analysis and estimated impact of the move to each cross-section of Duke Energy Ohio's operations – generation, transmission, and distribution. The fact that a multi-faceted analysis was presented to the Duke Energy corporate management in a comprehensive fashion rather than by discrete business units does not support an allegation of any cross-subsidy or violation of corporate separation. Rather, it shows that Duke Energy Ohio did perform analyses for each business segment, evaluated benefits and costs to the distribution business, the transmission business, and the generation business, all of which are impacted by RTO membership. Such is the case whether Duke Energy Ohio determined it should stay in Midwest ISO or realign to PJM. In this case, the analysis showed that the realignment to PJM is the right decision, given the sum total of the expected strategic benefits.

Contrary to IEU's baseless allegations, the potential for additional [redacted] associated with the realignment to PJM was not a deciding factor for either the Company or *corporate executive management* as to whether or not Duke Energy Ohio should proceed with the RTO realignment. Rather, as outlined by Mr. Trent, Ms. Janson, and Mr. Whitlock, as well as being set forth in IEU Exhibits 1, 2, and 3, the strategic benefits of PJM membership were the driving factors that prompted Duke Energy Ohio to seek to realign its RTO membership.[162] Common sense dictates such a conclusion when one considers the [redacted] presented to the TRC as part of their review, and the context provided by Duke Energy Ohio's

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[161] Cross-examination of Keith Trent, Tr. IV at 763-764.

[162] *See* Cross-examination of Julie Janson, Tr. II at 323, referencing Cross-examination of Julie Janson, Tr. I at 50; *see also*, Cross-examination of Keith Trent, Tr. IV at 764.

witnesses under cross-examination. As evidenced in Confidential IEU Exhibit 2, the final version of the Whitepaper presented to the TRC, the [redacted] To put this amount in context, an annual increase of [redacted] of incremental EBITDA over Duke Energy Ohio's 2009 electric-only total EBITDA.[164] Moreover, as was explained by Mr. Jennings, who performed the analysis, that assumption was one of hundreds of scenarios analyzed[165] and is not reliable as the analysis is stale [redacted][166] As was explained by Mr. Whitlock, factoring in the impact of the assumptions reduces the assumed [redacted] in that particular analysis from [redacted] Thus, the assumed impact of [redacted] as stated in IEU Confidential Exhibits 1, 2, 3, 4, 6, 8, 9, and 10 is marginal at best. Moreover, those assumed projections were appropriately qualified when one views the documents in total as was presented

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[163] *See* IEU Exhibit 2 at 1 of 3.

[164] *See* Duke Energy Ohio FERC Form 1, calculating total Duke Energy Ohio electric only EBITDA for 2009 as $693,859,397.

[165] Cross-examination of Kenneth Jennings, Conf. Tr. III at 542. *See also* Cross-examination of Charles Whitlock, Conf. Tr. II at 412-414.

[166] Cross-examination of Kenneth Jennings, Conf. Tr. III at 532-534.

[167] Cross-examination of Charles Whitlock, Conf. Tr. II at 412-413; Redirect examination of Charles Whitlock, Conf. Tr. II at 427.

to the TRC, rather than individually as IEU would have this Commission do.[168] The potential for such [redacted] through a realignment to PJM pales in comparison to the strategic benefits expected for customers, the Company and the competitive retail electric market as was articulated by Duke Energy Ohio's witnesses. IEU's unsupported claims to the contrary are, at best, dubious and, at worst, a gross and intentional mischaracterization of the facts. IEU simply uses a single scenario, based on one set of assumptions out of many that were considered, ignores all other assumptions and, indeed, even the reasonableness of those assumptions, and uses that single scenario to manufacture a claim.

IEU also makes a baseless argument that the recovery of realignment costs through a non-bypassable rider is a violation of the policy of the state of Ohio. IEU correctly recites Ohio policy as avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. There, IEU's correct analysis stops. IEU claims that the purpose of the realignment to PJM is to [redacted] and that, while Duke Energy Ohio's distribution customers pay the costs of the move, [redacted]. The problem with this analysis is that IEU has not even attempted to point to any subsidy that would be flowing, as per the statutory language, from the regulated utility to a competitive electric service. First, the charge in question is not to distribution customers. It is transmission customers that would pay the costs of the move. And the benefits of the move flow primarily to transmission customers. There is no subsidy here that might violate state policy.

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[168] *See, e.g.*, Confidential IEU Exhibit 4. [redacted]

Similarly, case law specifies that generation costs are not to be recovered through distribution rates.[169] Again, here there is no such prohibited recovery.

The next issue to be raised as a state policy matter is a proposal, by Staff and OPAE, for load caps on bidders in the auctions. Staff suggests that the Commission should require load caps to limit the number of tranches that could be won by any single bidder in an auction. Staff argues that such a limitation would encourage participation by bidders and assure diversity of supply in conformity with R.C. 4928.02(C). Determination of the precise load cap would, under Staff's proposal, be subject to the Commission's ongoing review.[170] OPAE agrees.[171]

Load caps are not required in a CBP. And as such load caps are contrary to the plain language of R.C. 4928.142(A)(1)(e), this recommendation must be rejected. Indeed, in detailing the requirements for an acceptable MRO, the General Assembly contemplated that there could be *one* bid winner. Load caps would necessarily prevent this outcome as no one least-cost bidder would emerge. Furthermore, as Staff has confirmed, load caps have not functioned to ensure successful auctions.[172]

I. Customer Load Description – O.A.C. 4901:1-35-03(B)(2)(e)

An MRO applicant is required to provide a detailed description of the load to be served by the winning bidder or bidders, together with any known factors that may affect such load.

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[169] *Industrial Energy Users-Ohio v. Public Utilities Commission of Ohio*, (2008), 117 Ohio St.3d 486, 2008 Ohio 990, 885 N.E.2d 195; *Migden-Ostrander v. Public Utilities Commission of Ohio* (2004), 102 Ohio St.3d 451, 453, 2004 Ohio 3924, 812 N.E. 2d 955 (SB 3, the predecessor to SB 221, "ensured that distribution service would not subsidize the generation portion of the business").

[170] Staff Initial Brief at 26.

[171] OPAE Initial Brief at 7-8.

[172] Cross-examination of Raymond Strom, Tr. V at 1046-1052.

Duke Energy Ohio complied with this requirement and neither Staff nor any intervenor has disputed this fact.

J. Services to be Provided by Winning Bidder; Agreements – O.A.C. 4901:1-35-03(B)(2)(f) and (g)

An MRO application must also include descriptions of the generation and related services to be provided by the winning bidder or bidders and drafts of all documents to be execute as a part of the CBP. No one has disputed that Duke Energy Ohio met this requirement.

K. Evaluation Methodology for Bids – O.A.C. 4901:1-35-03(B)(2)(h)

Again, neither Staff nor any intervenor disputes that Duke Energy Ohio has clearly described the methodology for evaluating bids, as required.

L. Consultant – O.A.C. 4901:1-35-03(B)(2)(l)

As required by the Commission's rules, Duke Energy Ohio's CBP plan provides for the funding of a consultant who will may assess and report on the solicitation. This has not been disputed.

M. Alternative Energy – O.A.C. 4901:1-35-03(B)(2)(n)

Neither Staff nor any intervenor disputed whether Duke Energy Ohio had complied with O.A.C. 4901:1-35-03(B)(2)(n), which simply requires the applicant to show any relationship between the proposed CBP and plans to comply with alternative energy portfolio, energy efficiency, and peak demand reduction requirements.

Ohio Advanced Energy (OAE) suggests that the Commission allow Duke Energy Ohio to recover the costs that would be associated with its entering into long-term contracts, conterminous with those contracts. In other words, OAE suggest that recovery of the cost associated with a long-term contract occur over a period equal to the length of that contract. It proposes that this would help to remove the regulatory risk associated with long-term cost recovery in Ohio. Duke Energy Ohio does not object to recovery of costs of long-term contracts over the term of the contracts, provided it is operating under an MRO where regulatory certainty is afforded.

The Ohio Environmental Council (OEC) is concerned about solar renewable energy credits (SRECs), which may be purchased by utilities in order to comply with the solar energy resource requirements. Like OAE, OEC believes that long-term contracts are critical to the development of the solar industry. OEC proposes that the Commission mandate that Duke Energy Ohio enter into a certain number of long-term SREC agreements.[173] While OEC believes that there is little risk to Duke Energy Ohio in this proposal, Duke Energy Ohio disagrees. Without long-term cost recovery assured, Duke Energy Ohio would incur unreasonable risk.

N. Obstacles – O.A.C. 4901:1-35-03(B)(2)(o)

Duke Energy Ohio has clearly explained that it knows of no obstacles that may create difficulties or barriers for the adoption of the proposed CBP. No dispute has been raised with regard to this requirement.

O. Corporate Separation Plan, Aggregation – O.A.C. 4901:1-35-03(B)(3) and (4), and (F)

No party has disagreed with Duke Energy Ohio's description of its corporate separation plan, as required by Commission rules, or with its description of how it will address governmental aggregation programs.

III. Motion to Dismiss

IEU renews its motion to dismiss, claiming that the Commission lacks subject matter jurisdiction over this proceeding. Duke Energy Ohio reiterates its memorandum in opposition to

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[173] OEC Initial Brief at 2-5.

said motion and further emphasizes that IEU's motion expressly ignores the specific functions that the General Assembly directed the Commission to undertake when reviewing an application for approval of an MRO. Significantly, the Commission is required to determine whether the application meets the applicable filing requirements, which are enumerated in R.C. 4928.142(A) and (B) and O.A.C. 4901:1-35-03. If the Commission should find that any of these requirements have not been met, it must inform the utility as to how the utility may cure the deficiency to the satisfaction of the Commission and in a timely manner.[174] To accept IEU's contention that the Commission lacks subject matter jurisdiction, the Commission would be forced to abdicate its statutory obligation to ascertain whether an application is compliant and, if not, to guide the utility in how to correct the shortcoming. For the reasons set forth in its memorandum in opposition and as briefly reiterated here, Duke Energy Ohio requests that IEU's motion to dismiss be denied.

Further, in response to IEU's argument – curiously placed in a footnote – that the transition to full market pricing must occur over a five- to ten-year period, Duke Energy Ohio renews its argument that its proposed, accelerated transition to full market pricing is lawful. And, to alleviate IEU's concern that such an accelerated blending period runs afoul of R.C. 4928.02, the Company states that its proposed MRO undoubtedly advances state policy by, among other things, ensuring a diversity of suppliers, recognizing the continuing competitive market, ensuring effective competition, ensuring a reasonably priced retail electric service,

[174] R.C. 4928.142(B).

providing customer protection against unreasonable sales practices, and protecting at risk populations.[175]

IV. Conclusion

Duke Energy Ohio has filed an application for approval of its market rate offer, as is its option under R.C. 4928.141. The application meets all requirements under R.C. 4928.142, as well as the Commission's rule promulgated thereunder. Therefore, Duke Energy Ohio respectfully requests that the Commission approve its application, as submitted. In the event that the Commission finds any requirement that has not been met, Duke Energy Ohio will then consider the Commission's direction as to how such deficiency may be remedied in a timely manner and to the Commission's satisfaction.

Respectfully submitted,

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[175] *See, e.g.*, OCC Initial Brief, advocating that the MRO betters aligns with and advances state policy.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Duke Energy Ohio has been served to the parties by regular U. S. Mail, overnight delivery, or electronic delivery this 3rd day of February, 2011.

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